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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation,

Plaintiff,

v.

VITAL PHARMACEUTICAL, INC. aka VPX, a Florida corporation,

Defendant.

CASE NO. 08-CV-1545 WQH (BLM)

HANSEN BEVERAGE COMPANY'S NOTICE OF MOTION IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Date: October 20, 2008
Time: To Be Determined
Crtrm: 4

PLEASE TAKE NOTICE that on October 20, 2008, in the courtroom of the Honorable William Q. Hayes located at 940 Front Street, Courtroom 4, San Diego, California, at a time to be determined by the court, plaintiff Hansen Beverage Company ("Hansen") will move, and hereby does move, for an order preliminarily to enjoin defendant Vital Pharmaceutical, Inc. aka VPX from all activities that violate Section 1125 of the Lanham Act, including advertisements that use Redline Power Rush! 7-Hour energy Boost, or any other advertisement that claims 7 hours of energy.

This motion is based upon Hansen's notice of motion, Hansen's memorandum of points and authorities in support of its motion, the declarations of Rodney Sacks and Tom Davis, and the pleadings on file, and on such other evidence as may be presented at the time of the hearing.

DATED: September 8, 2008

Respectfully submitted,

SOLOMON WARD SEIDENWURM & SMITH, LLP

By: _/s/ Edward J. McIntyre_
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CERTIFICATE OF SERVICE

I caused the **HANSEN BEVERAGE COMPANY'S NOTICE OF MOTION IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** to be served in the following manner:

Electronic Mail Notice List

Currently no defense counsel appear to be listed to receive e-mail notices for this case.

Mailing List

I served the following by email and Federal Express:

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HANSEN BEVERAGE COMPANY, a Delaware corporation,

Plaintiff,

v.

VITAL PHARMACEUTICAL, INC. aka VPX, a Florida corporation,

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CASE NO. 08-CV-1545 WQH (BLM)

HANSEN BEVERAGE COMPANY'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION

Date: October 20, 2008
Time: To Be Determined
Crtrm: 4

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I
INTRODUCTION

Vital Pharmaceutical advertises and sells "REDLINE Power Rush! 7-Hour Energy Boost ("7-Hour Energy"), a 2 oz. "energy shot" that claims it delivers **seven hours** of **pure** energy in mere minutes. Vital Pharmaceutical's advertising claims, however, are literally false—7-Hour Energy does not provide **seven hours** of energy; indeed it provides **no** physical energy.

Vital Pharmaceutical's false advertising claims have worked and as a result, Hansen has suffered and continues to suffer irreparable harm. As a consequence, Hansen is entitled to injunctive relief.

II
FACTUAL BACKGROUND

Hansen.

Since 1992, Hansen has developed, marketed, sold, and distributed a variety of product lines in the specialty beverage category—sodas, fruit juices, smoothies, lemonades, iced teas and energy and sports drinks.

In 1997 Hansen introduced Hansen's® Energy Drinks. Then, in April 2002, Hansen released the first of its popular Monster Energy® drinks. The Monster Energy® drink line has since grown to include Lo-Carb Monster, Monster Khaos, Monster Assault, Monster M-80, Monster Heavy Metal, and Monster Mixxd energy drinks, which also use the Monster and Monster Energy® trademarks and similar trade dresses.[1]

In 2004, Hansen introduced Lost® Energy™ Drinks and Rumba™. In 2005, Hansen brought out Joker Mad Energy™ drinks, a low-carb version of Lost® under the Perfect 10™ brand name as well as a new Lost® Five-O™ energy drink. In 2006 Hansen introduced Ace™ Energy drinks and Unbound Energy® drinks.[2]

Hansen's energy drinks have been most successful; more than 100,000 retail stores across the United States—convenience stores, gas stations, supermarkets, club stores, drug stores, warehouse stores[3]—sell them. They are the favored energy drinks of millions.[4] A June 28, 2008 Nielsen survey demonstrates that Hansen's Monster Energy® in the 16 oz can is now **the** market leader in the United States. Overall, Hansen enjoys a 28.3% market share.[5]

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[1] Declaration of Rodney Sacks ("Sacks Decl.") ¶¶ 3, 4.

Direct Competition Between Hansen and Vital Pharmaceutical.

The energy drink industry is highly competitive. Hansen competes not only with "traditional" energy drinks like Red Bull—sold in 8, 12 and 16 oz. cans—but also with companies like Vital Pharmaceutical, which market their 2 oz. drinks as "energy shots".[6]

Vital Pharmaceutical characterizes its 7-Hour Energy "energy shot" as producing **seven hours** of **energy**. Vital Pharmaceutical's own advertisements—undisputed and indisputable facts—drive Hansen's motion.

Vital Pharmaceutical's Literally False Advertisements.

Contains 2 Servings
REDLINE
POWER RUSH!
7-HOUR
ENERGY BOOST
7 Hours of Pure Energy
No Crash
Zero Sugar/Zero Carbs
Vitamins & Amino Acids
EXOTIC FRUIT
2.5 FL OZ (74mL) DIETARY SUPPLEMENT

7-Hour Energy conspicuously proclaims on its drinks' label:

- "7 Hours of Pure Energy"
- "No crash"
- "Zero Sugar/Zero Carbs"
- "Vitamins & Amino Acids"

Vital Pharmaceutical's web site touts the following benefits of drinking 7-Hour Energy: ...So goes the saying, "big things come in small packages," with **seven, that's right seven**

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2 *Id.* at ¶ 5.
3 *Id.* at ¶ 6.
4 *Id.*
5 *Id.* at ¶ 7.
6 *Id.* at ¶¶ 8, 9.

> **hours** of **sustained** energy that will leave you **"amped"**[7] **to the max in minutes, ready to tear apart the weights and wear out the treadmill** like a tiger released from its cage! With **no crash**, Redline Power Rush® does not stop there, **the intense energy will last** beyond your workout to keep you focused and **energized throughout the day**.
>
> - 7 Hours of Sustained Energy
> - No crash
> - Zero Sugar
> - Zero Carbs

Based on 7-Hour Energy's ingredients and fundamental science, 7-Hour Energy's claims—specifically the name itself, and the boasts, "7 Hours of Pure Energy," "7 Hours of Sustained Energy" and "No crash"—are literally false statements about 7-Hour Energy.[8]

Because these claims are literally false—as science proves —Hansen seeks an order stopping them.

What is Energy?

"Energy" is, and has been for years, a scientific term, defined in all physics and biochemistry textbooks and even in online resources such as Wikipedia.[9] One such standard definition states: "Energy" is often defined as the ability to do work… . Energy is often stored by cells in the form of substances such as carbohydrate molecules (including sugars) and lipids, which release energy when reacted with oxygen."[10] Energy-yielding nutrients are carbohydrates, proteins, fats and alcohol.[11]

Thus, there is a direct relationship between calories and energy; humans need calories every day, even without exercise, just to exist.[12] Mental energy also requires calories. The brain uses only glucose as an energy source and will starve the rest of the body's glucose stores, if necessary, to supply itself. Brain neurons cannot fire without glucose and require calories in the form of glucose to function.[13]

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7 "Amped "is defined as "energized." Webster's II New College Dictionary 2001.
8 Declaration of Dr. Thomas P. Davis, Ph.D. ("Davis Decl.") ¶ 4. Hansen submits the first four pages of Dr. Davis' extensive curriculum vitae and his declaration in support of this motion.
9 Davis Decl. ¶ 4.
10 *Id.* at ¶ 7.
11 *Id.* at ¶¶ 12, 13.
12 *Id.* at ¶ 9.
13 *Id.* at ¶ 11.

Vital Pharmaceutical's advertisements, including its claims that consumption of 7-Hour Energy will make the user "ready to tear apart the weights and wear out the treadmill like a tiger...," in the context in which Vital Pharmaceutical presents them that 7-Hour Hours not only delivers physical energy but **seven hours** of it. One does not "tear apart weights" and "wear out a treadmill like a tiger" with any type of energy other than "**physical** energy." One does not engage in these activities Vital Pharmaceutical's touts—especially for **seven hours** without physical energy.

7-Hour Energy's Demonstrably False Statements.

As Dr. Davis testifies, and as high school biology students have known for decades, human energy requires calories.[14] Not only, however, does Vital Pharmaceutical claim that its 7-Hour Energy drinks deliver energy, but that the energy produced is "sustained" for **seven** hours—even as the product's own name proclaims. The compounding effect of Vital Pharmaceutical's advertising only underscores the literal falsity of its product name, its labeling and its other advertisements. That claim, not only as touted on the label, but as proclaimed in Vital Pharmaceutical's other advertisements, is literally false and, for that reason, should be enjoined.

As Dr. Davis testifies, Vital Pharmaceutical's claims are literally false based on established principles of physics, biochemistry, pharmacology and physiology and 7-Hour Energy's disclosed ingredients. At least the following claims are demonstrably false:

- "7 Hours of Pure Energy;"
- "7 Hours of Sustained Energy;"
- "No crash;" [15]

Irreparable Injury.

Vital Pharmaceutical's statements are literally false statements about its own products and also, by clear inference, about Hansen's. They are designed to, and most likely do, influence the purchasing decisions of a substantial number of reasonable consumers and actually deceive or tend

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14 Davis Decl. ¶ 9.
15 Davis Decl. ¶¶ 4, 15, 16.

to deceive a substantial segment of the reasonable consumer audience.[16]

It is a practical impossibility to "counter" Vital Pharmaceutical's literally false statements about its own product.[17] Hansen filed this action on August 21, 2008 and served Vital Pharmaceutical the following day. Despite such notice, Vital Pharmaceutical has persisted with the same advertisements and has made clear that it will continue to do so unless this Court enjoins it.[18]

More importantly, money damages are clearly inadequate to compensate Hansen for the harm it will continue to suffer. Hansen cannot know or measure with precision sales lost from Hansen customers who purchase Vital Pharmaceutical's products instead of Hansen's because of this advertising.[19]

III
HANSEN IS ENTITLED TO INJUNCTIVE RELIEF

Legal Standard For Granting a Preliminary Injunction.

The Ninth Circuit standard is well-established. If the moving party shows **either** (1) a combination of probable success on the merits and the possibility of irreparable harm, **or** (2) the existence of serious questions going to the merits and the balance of hardships tipping in its favor,[20] it is entitled to relief. These are not separate tests but outer reaches of a single continuum.[21]

Hansen is entitled to a preliminary injunction because it has established the probability of success and the possibility of irreparable harm that it has and will continue to suffer.

Hansen Will Succeed On The Merits of its False Advertising Claim.

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), establishes a federal cause of action for false advertising. The statute provides:

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[16] Sacks Decl. at ¶ 16.
[17] *Id.* at ¶ 17.
[18] *Id.* at ¶ 18.
[19] *Id.* at ¶ 20.
[20] *Miss World (UK) Limited. v. Mrs. America Pageants, Inc.*, 856 F.2d 1445, 1448 (9th Cir. 1988).
[21] *Dollar Rent A Car, Inc. v. Travelers Indem. Co.*, 774 F.2d 1371, 1374-75 (9th Cir. 1985).

> (1) Any person who, on or in connection with any goods or services . . . uses in commerce any . . . false or misleading description of fact, or false or misleading representation of fact, which -
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

A plaintiff shows a likelihood of success on a Lanham Act false advertising claim by demonstrating that the advertisement is "literally" or facially false.[22] The test for literal falsity is quite simple: "If a defendant's claim is **untrue**, it must be deemed **literally false**."[23]

Where an advertisement is literally false, the court may enjoin its use without any extrinsic evidence of the advertisement's impact on the buying public.[24]

The Ninth Circuit has adopted the "false by necessary implication" doctrine.[25] Accordingly, a district court evaluating whether an advertisement is literally false must analyze the message **in full context**.[26] Thus, to determine facial falsity the court must view the statement in its entirety, rather than examining the eyes, nose, and mouth separately and in isolation from each other.[27] If the words or images, considered in context, **necessarily imply** a false message, the advertisement is literally false and no extrinsic evidence of consumer confusion is required.[28]

Vital Pharmaceutical's Product Label Is Literally False.

Vital Pharmaceutical makes numerous claims on its 7-Hour labels:

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22 *See Johnson & Johnson-Merck Consumer Pharms. Co. v. SmithKline Beecham Corp.*, 960 F.2d 294, 297 (2d Cir. 1992).

23 *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 944 (3d Cir. 1993).

24 *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 317 (2d Cir. 1982); *In re Century 21etc. v. Re/Max South Country*, 882 F.Supp.915, 922 (C.D. Cal. 1994) ("In other words, if an advertisement is literally or explicitly false, the plaintiff need not prove any impact on the buying public."); *Taser International, Inc. v. Bestex Company, Inc., et al.*, 2007 U.S. Dist. LEXIS 80775 *20 (C.D. Cal. 2007).

25 *See e.g. Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997); *Time Warner Cable, Inc. v. Directv*, Inc., 497 F.3d 144, 158 (2d Cir. 2007); *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 274 (4th Cir. 2002); *Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 34-35 (1st Cir. 2000); *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 946-47 (3d Cir. 1993).

26 *Southland Sod Farms, supra* at 1139. See also discussion at pp. 14-15, below for FDA regulations that also require that dietary supplements' claims be judged in context.

27 *Southland Sod Farms, supra* at 1139.

28 *Id.*

Contains 2 Servings
REDLINE
POWER RUSH!
7-HOUR
ENERGY BOOST
7 Hours of Pure Energy
No Crash
Zero Sugar/Zero Carbs
Vitamins & Amino Acids
EXOTIC FRUIT
2.5 FL OZ (74mL) DIETARY SUPPLEMENT

The labels themselves, taken in context, claim that 7-Hour Energy 1) will provide energy; 2) this energy will last **for hours**, in fact for **seven** hours; 3) that the user will experience a "power rush." These claims are demonstrably false.

In fact, the only claims that are not false—"Zero Sugar;" "Zero Carbs"—underscore precisely why the critical claims are literally false. As a matter of science, energy comes from calories.[29] 7-Hour Energy says it has zero calories. The absence of calories cannot provide any energy, let alone **7 hours** of "pure," "sustained" energy, as the 7-Hour Energy product label and website proclaims.[30]

The FDA: Energy and Calories.

7-Hour Energy admits on its label that it is a "dietary supplement." The FDA's regulations for nutrition labeling of dietary supplements state that the FDA considers calories and "energy" to be synonymous:

> The following synonyms may be added in parentheses immediately following the name of these (b)(2) dietary ingredients: Vitamin C (ascorbic acid), thiamin (vitamin B 1), riboflavin (vitamin B 2), foliate (folacin or folic acid) , and **calories** (**energy**).
>
> The regulations further provide that:
>
> … [e]nergy content per serving may be expressed in kilojoule units, added in parentheses immediately following the statement of caloric content.[31]
> FDA Requirements for Dietary Supplement Claims.

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[29] Davis Decl. ¶¶ 7, 12.
[30] Davis Decl. ¶ 22.
[31] 21 CFR § 101.36(b)(2)(B)(2). [Emphasis added.] *See* Davis Decl. ¶ 8 for relationship between joules, kilojoules and Calories.

The FDA regulations mandate:

> (1) *Health claim* means any claim made on the **label** or in labeling of a food, including a **dietary supplement**, that expressly **or by implication**, including "third party" references, written statements (e.g., a brand name including a term such as "heart"), **symbols** (e.g., a heart symbol), or **vignettes**, characterizes the relationship of any substance to a disease or health-related condition. **Implied** health claims include those **statements, symbols, vignettes**, or other forms of communication that suggest, **within the context in which they are presented**, that a relationship exists between the presence or level of a substance in the food and a disease or health-related condition.[32]
>
> * * *
>
> (3) *Nutritive value* means a value in sustaining human existence by such processes as promoting growth, replacing los of essential nutrients, or **providing energy**.

The same regulations mandate that any claim must be "**complete, truthful, and not misleading.**"[33] Under both FDA standards and Ninth Circuit decisional law, Vital Pharmaceutical's claims are literally false and, as such, should be enjoined.

The Ninth Circuit: Standard for "Literally False."

Southland Sod Farms[34] provides a pointed analysis of what constitutes literal falsity and the importance of context in determining when an advertisement is a literal falsity. *Southland* involved competing turf grass seed and sod producers. Plaintiff claimed that defendant's comparative advertising was false while asserting that its own Bonsai grass grew slower—a desirable characteristic that reduces mowing and maintenance costs.

One advertisement was a bar chart graphically comparing clipping weights of competitors' grass, including plaintiff's. Plaintiff claimed that the underlying tests were flawed because they were done in the first spring following a fall planting—when the defendant's product characteristically grew at a slower rate than competitors'. Notably, the charts did say that the data was accumulated over a limited time period in a particular location. Plaintiff showed that when an entire year's growth was used, its grass' growth was comparable to the defendant's.

The Ninth Circuit reversed the district court's finding that the advertisements were not literally false. "We find that the district's court's conclusion as to literal falsity to be erroneous because it failed to consider Defendant's bar-chart advertisements in their full context."[35]

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[32] 21 CFR § 101.14(a)(1) and (3) [Emphasis added.]

[33] 21 CFR § 101.14(d)(2)(iii). 21 U.S.C. §§ 331(a) and 343(a) require that dietary supplements be sold in accordance with the FDCA's labeling regulations including 21 CFR §§ 101.14 and 101.36.

By contrast, Vital Pharmaceutical's claims are patently and literally false. In *Southland*, at least the bar chart mentioned that the results were based on data from a limited time period—still insufficient by Ninth Circuit standards. Here the name "**7-Hour Energy**," and the claims "**Pure Energy**" are unsupported and unsupportable. Energy, whether physical or mental, results from burning calories; it can be measured. Energy is defined as "vigor in performance of an action**,**"[36] precisely what not only Vital Pharmaceutical's 7-Hour Energy name, packaging and advertising all claim but, worse, that the energy will last **for hours – 7 hours**.

The Lanham Act encompasses more than blatant falsehoods. It also embraces innuendo, indirect intimations, and ambiguous suggestions.[37]

Vital Pharmaceutical's web site's description of its 7-Hour Energy product, explains that the use will give the user energy "in minutes," so that he or she can "tear apart the weights and "wear out the treadmill." Such a description of the products alleged efficacy screams physical energy, as does the 7-Hour Energy name itself and the prominent claims: "**sustained energy**;" "energy boost;" "pure energy" and "power rush"– but critically it promises sustained energy that lasts **for hours**.

These are literally false claims. 7-Hour Energy, based on its own ingredients and fundamental science, does not and cannot provide the "energy" that allows one to engage in sustained physical or mental activity—and especially **seven hours** of claimed activity.

Consequences of Using a Deceptive Trademark or Trade Name.

Recently, the Ninth Circuit affirmed stripping a party's trade name because a dietary supplement violated FDA labeling regulations and was, as a consequence, deceptive. In

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34 *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134 (9th Cir. 1997).
35 *Id.* at 1144.
36 See, e.g., *Webster's II New College Dictionary,* 2001 Edition.
37 *Southland Sod Farms, supra,* at 1140.

Creagri,[38] the court upheld trademark priority for a competitor and cancellation of the mislabeled product's trademark registration.[39] The court's reasoning applies equally here:

> [T]he nexus between a misbranded product and that product's name, particularly one designed for human consumption, is sufficiently close to justify withholding trademark protection for that name until and unless the misbranding is cured.[40]

Vital Pharmaceutical's label violates the same FDA regulations. Accordingly, it should be barred from using its "7-Hour Energy" name, precisely because any qualification or "correction" is, or would be, meaningless.

In *Resort Car Rental System,*[41] the Ninth Circuit upheld striking the trade name "Dollar-a-Day" as deceptive, rejecting the argument that the consumer learned the actual facts before entering into a contract. "The 'Dollar-A-Day' slogan carries strong psychological appeal. Its connotations are obvious. … the public is not under any duty to make reasonable inquiry into the truth of advertising. … Advertising capable of being interpreted in a misleading way should be considered against the advertiser."[42]

The court also rejected the argument that excision of the trade name "Dollar-A-Day" destroyed valuable good will, finding that the name **by its nature** has a decisive connotation for which any qualifying language would result in a contradiction in terms.[43] 7-Hour Energy has an equally "decisive connotation" such that any qualifying language on the container or elsewhere likewise results in contradiction.

The *Continental Wax*[44] court reached the same conclusion when it upheld striking the trade name "Six Month Floor Wax" as incurably deceptive.

> Where, as here, however, the offending deception is caused by a clear and unambiguous false representation implicit in the product's name and, because of this, the addition of a qualifying phrase denying the truth of that representation would lead to a confusing

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38 *Creagri, Inc v. USANA Health Sciences, Inc.*, 474 F.3d 626 (9th Cir. 2007).

39 The court held that "use in commerce" for trademark priority meant **lawful** use and lawful use meant compliant with "federal labeling requirements."

40 *Id.* at 631-32. Creagri's trademarked product claimed first 25mg and then 5mg or hydroxytyrosol; the accurate amount was 3mg. That difference made it unlawful and supported cancellation of the trademark.

41 *Resort Car Rental System, Inc., et al. v. FTC,* 518 F. 2d 962 (9th Cir. 1975).

42 *Id.* at 964.

43 *Id.*

44 *Continental Wax Corporation v. FTC*, 330 F.2d 475 (2d Cir. 1964).

contradiction in terms, no remedy short of complete excision of the trade name will suffice.[45]

Viewing Vital Pharmaceutical's labels, packaging and claims, as *Southland Sod Farms* and FDA regulations require, the name "7-Hour Energy" and claims of "7 Hours of Pure Energy" claims, at a minimum, are literally false. Basic science demonstrates the point.

As *Creagri* makes clear, the literal falsity here is all the more pernicious precisely because the mislabeling is in the product's name itself: 7-Hour Energy. In the circumstances, "7-Hour Energy" should be enjoined.

Vital Pharmaceutical's Web Site Is Also Literally False.

7-Hour Energy's web site contains advertising that is also literally false.

Redline Power Rush®
Buy now
VPX has done it again with the introduction of the next generation of Redline® - Redline Power Rush®. Straight from the Redline® laboratories, VPX has taken the profound energy producing compounds of the Original Redline® and shrunk them into a small convenient bottle. So goes the saying, "big things come in small packages," with seven, that's right seven hours of sustained energy that will leave you "amped" to the max in minutes, ready to tear apart the weights and wear out the treadmill like a tiger released from its cage! With no crash, Redline Power Rush® doesn't stop there, the intense energy will last beyond your workout to keep you focused and energized throughout the day.
• 7 Hours of Sustained Energy
• No crash
• Zero Sugar
• Zero Carbs
REDLINE
REDLINE
REDLINE
REDLINE

It stresses "**sustained** energy," "within minutes" that leaves the user "amped to the max in minutes, ready to tear apart the weights and wear out the treadmill like a tiger released from its cage." —all physical activity; all requiring physical energy.

The "false by necessary implication" doctrine interprets that these advertising claims are designed to show the type and level of energy 7-Hour Energy supposedly produces. Like the 7-Hour Energy label, the web site states the product offers "7 Hours of Sustained Energy." Considered in context, such claims constitute a false message, making the ad literally false.

Judging the claims in the context in which they are presented, the conclusion is unmistakable: the "**7 Hours** of Energy" and "no crash" claims are literally false. As such, they should be enjoined.

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[45] *Id.* at 479-80. See also *Elliot Knitwear, Inc. v. FTC*, 266 F.2d 787 (2d Cir. 1959) ("Cashmora" sweaters, with no cashmere, deceptive); *FTC v. Army and Navy Trading Co.*, 88 F.2d 776 (D.C. Cir. 1937) ("Army and Navy" deceptive where goods no longer purchased from Army or Navy).

Hansen Will Suffer Irreparable Injury Absent Preliminary Injunctive Relief.

Hansen has been and will continue to be injured as a result of Vital Pharmaceutical's false claims—both on its web site and on the 7-Hour Energy bottle—that depict 7-Hour Energy as superior to Hansen energy drinks, causing it to lose customers, market share and good will. For a preliminary injunction, Hansen need only show the **possibility** of injury, without regard to its magnitude.[46]

Irreparable harm is presumed where the advertisements at issue are literally false and draw a direct comparison to the plaintiff.[47] Irreparable harm is even presumed without direct comparison.[48] In *McNeil-PPC v. Pfizer*,[49] Pfizer touted Listerine to be "as effective as floss." The court found this claim literally false, found that McNeil-PPC had been irreparably harmed, and issued a preliminary injunction. No commercial mentioned McNeil or its dental floss product by name; at best, some showed a white floss container similar to McNeil-PPC's.[50]

McNeil-PPC was **not** the only floss manufacturer in the industry; it was one of several, merely a "market leader" with an approximate 40% market share. That was sufficient under *Castrol* [51] for the court to presume irreparable injury as a matter of law.[52] Here too Hansen is one of the industry leaders in the energy drink market. By virtue of its position within the market, it continues to be harmed by Vital Pharmaceutical' false claims about 7-Hour Energy.[53]

This issue was raised and settled just two months ago in the Central District of California. *Pom Wonderful, LLC v. Purely Juice Inc.*[54] was a literal falsity advertising case where a

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46 *Simula Inc. v. Autoliv, Inc.,* 175 F.3d 716, 725 (9th Cir. 1999).
47 *Castrol Inc., supra,* at 62.
48 *See Time Warner Cable, Inc., supra.*
49 *McNeil-PPC, Inc. v. Pfizer Inc*., 351 F.Supp.2d 226 (S.D.N.Y. 2005).
50 *Id.* at 250.
51 *Castrol, Inc. v. Quaker State Corp.*, 977 F.2d 57, 62 (2d Cir. 1990) (misleading commercials that which tout the benefits of the product advertised but made no direct reference to any competitor's product).
52 *McNeil-PPC, supra*, at 250.
53 *Id.*
54 *Pom Wonderful, LLC v. Purely Juice Inc*, 2008 U.S. Dist. LEXIS 55426 (July 17, 2008).

competitor sought to preliminarily enjoin Purely Juice's product. Purely Juice advertised its pomegranate drink product as "100% pomegranate juice." Testing, however, revealed that Purely Juice's product contained sucrose and corn syrup – ingredients not found in pure pomegranate juice or pomegranate juice concentrate. The court issued a preliminary injunction because the label of the product, claiming to be 100% pure pomegranate juice was literally false. Citing to Third Circuit authority, the court stated that the "plaintiff did not have to introduce consumer testimony, marketing surveys ***or proof of lost profits to enjoin the use***" of Purely Juice's advertising.[55] The court reasoned that "[t]he fact that Purely Juice's false advertising ***pertained to the very nature*** of its juice product established its materiality."[56]

Here, we have literally false advertisements that tout the "benefits" of 7-Hour Energy – the false advertising pertains to the very nature of the product – its ability to deliver 7 hours of pure, sustained energy – but it cannot. Hansen has demonstrated irreparable harm as a matter of law. It has lost sales to Vital Pharmaceutical and has experienced a reduction in its goodwill.[57] "Because it is virtually impossible to prove that so much of one's sales will be lost or that one's goodwill will be damaged as a direct result of a competitor's advertisement, the plaintiff **need not point to an actual loss or diversion of sales** to satisfy this requirement."[58]

III
CONCLUSION

Vital Pharmaceutical's use of 7-Hour Energy and its claims that its drink provides "7 Hours of Pure Energy," "7 Hours of Sustained Energy," and "no crash" are literally false; they

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55 *Id*. at * 30. (Emphasis added).
56 *Id*. at *30 - *31. (Emphasis added).
57 Sacks Decl. ¶¶ 18, 19.
58 *Time Warner Cable, Inc., supra, at* 161, citing to *Coca-Cola Co., supra,* at 316. Emphasis added. *See also McNeil-PPC, supra,* at 250 ("I conclude that it is likely that Pfizer's ads will adversely affect PPC's sales, if they have not done so already.").

deceive the public in the marketplace. As a matter of law, this Court should issue a preliminary injunction and put a stop to Vital Pharmaceutical's 7-Hour Energy's claims—on its web site and on the product's label, including the 7-Hour Energy name—precisely because all of them are literally false advertisements that violate § 1125 of the Lanham Act.

DATED: September 8, 2008

Respectfully submitted,

SOLOMON WARD SEIDENWURM & SMITH, LLP

By: /s/ Edward J. McIntyre
NORMAN L. SMITH
EDWARD J. MCINTYRE
WILLIAM N. KAMMER
Attorneys for Hansen Beverage Company

CERTIFICATE OF SERVICE

I caused the **HANSEN BEVERAGE COMPANY'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION** to be served in the following manner:

Electronic Mail Notice List

Currently no defense counsel appear to be listed to receive e-mail notices for this case.

Mailing List

I served the following by email and Federal Express:

Vital Pharmaceuticals, Inc. Attn: Erica Stump, Esq. 15751 S.W. 41st Street, Suite 300 Davie, Florida 33331	

/s/ Edward J. McIntyre
EDWARD J. MCINTYRE

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Attorneys for HANSEN BEVERAGE COMPANY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation,

Plaintiff,

v.

VITAL PHARMACEUTICAL, INC. aka VPX, a Florida corporation,

Defendant.

CASE NO. 08-CV-1545 WQH (BLM)

DECLARATION OF RODNEY SACKS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Date: October 20, 2008
Time: To Be Determined
Crtrm: 4

Rodney Sacks declares:

1. I am the Chairman of the Board and Chief Executive Officer of Hansen Beverage Company ("Hansen"). The facts in this declaration are based on my own personal knowledge.

Hansen Beverage Company.

2. Since 1992, Hansen has developed, marketed, sold, and distributed a variety of product lines in the specialty or "alternative" beverage category—including non-alcoholic beverages such as sodas, fruit juices, energy and sports drinks, smoothies, lemonades, and iced teas.

3. Then, in April 2002, Hansen released the first of its popular Monster Energy® drinks. The line of Monster Energy® drinks has since grown to include the Lo-Carb Monster, Monster Khaos, Monster Assault, Monster M-80, Monster Heavy Metal, and Monster Mixxd energy drinks, which also use the Monster and Monster Energy® trademarks and similar trade dress.

4. In 2004, Hansen introduced Lost® Energy™ Drinks and Rumba™. In 2005, Hansen introduced Joker Mad Energy™ drinks, a low-carb version of Lost® under the Perfect 10™ brand name as well as a new Lost® Five-O™ energy drink.

5. In 2006 Hansen introduced Ace™ Energy drinks and Unbound Energy® drinks.

6. Hansen's energy drinks have been extremely successful and achieved significant success throughout the United States. They are the favored energy drinks for millions of customers. Hansen's energy drinks are sold by more than 100,000 retail stores, including convenience stores, gas stations, supermarkets, club stores, drug stores and warehouse stores.

7. The June 28, 2008 Nielsen survey demonstrates that Hansen's Monster Energy® in the 16 oz. can is now the market leader in the United States. Overall, Hansen enjoys a 28.3% share of the energy drink market.

Competition.

8. The energy drink industry is highly competitive. Hansen competes with "traditional" energy drinks, e.g. Red Bull Gmbh or The Coca-Cola Company.

9. Hansen also competes directly with another line of energy-drink products that

market themselves as "energy shots." These "energy shots" typically come in 2 or 3 oz packages—as opposed to the "traditional" energy drinks in 8, 16 and 24 oz. cans.

10. These "energy shots" compete fiercely with "traditional" energy drinks, which they falsely characterize as "energy sodas" and "canned energy drinks."

11. Vital Pharmaceutical advertises commercially and markets its competing energy drink products, named Redline Power Rush! 7-Hour Energy Boost, and each of which Vital Pharmaceutical publicly claims produces **seven hours** of energy.

Vital Pharmaceutical's Advertisements.

12. Vital Pharmaceutical advertises its 7-Hour Energy drinks across the United States. I have personally seen Vital Pharmaceutical's advertising— in print, on its own website and on its products.

13. 7-Hour Energy conspicuously makes the following claims on its drinks' containers:

- "7 Hours of Pure Energy"
- "No crash"
- "Zero Sugar/Zero Carbs"
- Vitamins & Amino Acids

14. Vital Pharmaceutical's false statements are not limited to the advertisements on its own packages.

15. Vital Pharmaceutical's web site states:

> So goes the saying, "big things come in small packages," with seven, that's right seven hours of sustained energy that will leave you "amped" to the max in minutes, ready to tear apart the weights and wear out the treadmill like a tiger released from its cage! With no crash, Redline Power Rush® does not stop there, the intense energy will last beyond your workout to keep you focused and energized throughout the day.

Hansen's Irreparable Injury and Balance of Hardship.

16. Vital Pharmaceutical's literally false statements about its own products, have influenced, and will continue to influence, the purchasing decisions of substantial numbers of consumers and actually deceive or will have the tendency to deceive a substantial segment of the reasonable consumer audience.

17. Hansen has suffered and will continue to suffer irreparable harm as a result of Vital Pharmaceutical's false statements—in particular the literally false statements about 7-Hour

Energy—because it is a practical impossibility for Hansen to "counter" Vital Pharmaceutical's false advertising.

18. Although Hansen initiated this action against Vital Pharmaceutical on August 21st, 2008 and served it the following day, Vital Pharmaceutical has persisted in the same false and misleading advertisements. Its conduct makes clear that, without this Court's injunction, Vital Pharmaceutical will continue in the same course of conduct and Hansen will continue to suffer irreparable harm.

19. I believe that Vital Pharmaceutical's ads have adversely affected Hansen's sales, even though I cannot quantify precisely by how much; certainly that they are most likely to do so into the future.

20. Money damages are patently inadequate to compensate Hansen for the harm it has and will continue to suffer precisely because Hansen cannot know or accurately measure sales it has as a direct or at least essential result of Hansen customers purchasing Vital Pharmaceutical's products instead of Hansen's specifically because of Vital Pharmaceutical's false advertising. Hansen also cannot know or accurately measure sales lost as a direct or at least substantial result of potential customers having been driven away.

I declare on penalty of perjury under the laws of the State of California and the United States of America that the facts in this declaration are true and correct, based on my own personal knowledge and on information from our science expert which I believe to be true and correct, and that I executed this declaration in Corona, California, on September ___, 2008.

RODNEY SACKS

CERTIFICATE OF SERVICE

I caused the **DECLARATION OF RODNEY SACKS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** to be served in the following manner:

Electronic Mail Notice List

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Mailing List

I served the following by email and Federal Express:

Vital Pharmaceuticals, Inc. Attn: Erica Stump, Esq. 15751 S.W. 41st Street, Suite 300 Davie, Florida 33331	

/s/ Edward J. McIntyre
EDWARD J. MCINTYRE

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Attorneys for HANSEN BEVERAGE COMPANY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation, Plaintiff, v. VITAL PHARMACEUTICALS, INC aka VPX, a Florida corporation, Defendant.	CASE NO. 08-CV-1545 WQH BLM **DECLARATION OF THOMAS P. DAVIS, Ph.D. IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** Date: October 20, 2008 Time: To Be Determined Courtroom: 4

Thomas P. Davis, Ph.D. declares:

1. I am and have been Hansen Beverage Company's ("Hansen") Technical Director continuously since January of 1981. I am and have been a Professor of Medical Pharmacology, also continuously since January of 1981. I have a Ph.D. in physiology and biochemistry, awarded in 1978 from the University of Missouri. I had post-doctoral training at a major pharmaceutical company from 1978 to 1981. I attach the first four pages of my curriculum vitae as Exhibit 1.

2. I have extensive experience in both juice (since 1964) and carbonated beverages (since 1980). I am familiar with the ingredients of and the advertisements for Vital Pharmaceutical's "REDLINE Power Rush! 7-Hour Energy Boost."

3. REDLINE Power Rush! 7-Hour energy Boost conspicuously makes these claims on the current labels on its drink containers:

- "7 Hours of Pure Energy"
- "No crash"
- "Zero Sugar/Zero Carbs"
- "Vitamins & Amino Acids"

4. Based on Vital Pharmaceutical's labels and based on the drink's ingredients and the generally accepted principles of biochemistry, pharmacology, and physiology, in my expert opinion, the product's very name, "7-Hour Energy Boost", is a literally false claim about this product, as it necessarily states or at least implies that the product produces seven hours of energy.

5. As I explain below, this product does not, and cannot, produce energy, a defined scientific term, for the period of time that Vital Pharmaceutical claims, in any measurable amount (if its products produce energy at all) and certainly not seven hours of energy. As I explain below, energy is a measurable physical fact.

6. In addition, for the same reasons, Vital Pharmaceutical' claims—specifically, "7 Hours of Pure Energy" and "No crash"—are literally false statements about REDLINE Power Rush! 7-Hour energy Boost. Let me explain why.

7. By way of introduction, I should explain that "energy" is a scientific term and is defined in all physics textbooks and all biochemistry textbooks as well as in online resources such as Wikipedia. This is a portion of Wikipedia's discussion: "Energy is often defined as the ability

to do work.... In biology, chemical bonds are broken and made during metabolic processes, and the associated changes in available energy are studied in the subfield of bioenergetics. Energy is often stored by cells in the form of substances such as carbohydrate molecules (including sugars) and lipids, which release energy when reacted with oxygen." (http://en.wikipedia.org/wiki/Energy.)

8. There is a direct relationship between calories and energy. "Throughout the history of science, energy has been expressed in several different units such as ergs and calories. At present, the accepted unit of measurement for energy is the SI [International System of Units] unit of energy, the joule." (http://en.wikipedia.org/wiki/Energy.) Food energy, however, is often stated in calories, and the conversion from joules to energy calories is a simple mathematical exercise: one joule is equal to 0.239 energy calories. [The scientific term Kilocalorie, 1000 energy calories, is equivalent to the term used by food nutritionists, "Calorie," often used with a capital "C" to avoid confusion.]

9. A human being requires a certain number of calories of energy every day, even without exercise, simply to exist. These calories of energy are required to maintain what is known as "basal metabolic rate" (BMR) in any man or woman, and an average BMR rate is about 1266 Kcal or food Calories per day. This is the basic requirement even if that person was at rest all day. This daily requirement, or BMR rate, breaks down to about 53 Kcalories per hour or 0.879 Kcalories per minute. Of course, a moderate amount of exercise per minute, hour, day, or week increases the basic requirement dramatically.

10. Mental energy or brain metabolism is defined scientifically as the degree or level of glucose metabolism in the brain. It can be followed carefully by imaging techniques in humans and is easily quantified. The brain uses glucose as a source of energy and will starve the rest of the body's stores of glucose if needed to supply the brain. In times of severe starvation, the brain may use free fatty acids to survive but this is usually near death.

11. Mental energy can be thought of as cognitive ability or the ability to reason or intelligence quotient. Reason, cognition and integration, however, all require glucose as the energy source. Brain neurons cannot fire without glucose as they also require calories in the form

of glucose to function.

12. Without glucose to deliver to the brain, one can die. The brain needs many calories per minute, per hour, per day, consuming 20% of total calories available to the human body. It is the second most calorie dependent organ in the human body; the liver is first because of its size. In fact, there is no type of human energy that does not require consumption and burning of calories. The only energy-yielding nutrients are proteins, carbohydrates, alcohol, and fats.

13. There are no calories in vitamins. As a result, vitamins cannot be energy-yielding nutrients. Vitamins can aid energy production as co-factors of energy producing cellular reactions, but alone they provide no calories. In other words, they cannot be broken down for energy. Similarly, for all practical purposes, amino acids contain no caloric energy. Again, only fats, carbohydrates, alcohol, and proteins contain calories. Single amino acids do not contribute to a human's energy requirement in calories. However the single amino acid Taurine does function to stabilize and "strengthen" the cardiac muscle cell and support cardiac cell performance. This role is unique to Taurine.

14. Vital Pharmaceutical's makes the following claims on its website regarding REDLINE Power Rush! 7-Hour Energy Boost:

> So goes the saying, "big things come is small packages," with seven, that's right seven hours of sustained energy that will leave you "amped" to the max in minutes, ready to tear apart the weights and wear out the treadmill like a tiger released from its cage! With no crash Redline Power Rush® doesn't stop there, the intense energy will last beyond your workout to keep you focused and energized throughout the day.

15. In my expert opinion, Vital Pharmaceutical's claims in this advertisement that REDLINE Power Rush! 7-Hour Energy Boost provides "seven hours of sustained energy" or "that it will leave you amped to the max in minutes" or "no crash" are false based on the drink's ingredients, the concentration of those ingredients, and generally accepted principles of biochemistry, pharmacology, and physiology.

16. In my expert opinion, the ingredients in REDLINE Power Rush! 7-Hour Energy Boost – at least as disclosed—"zero sugar," "zero carbs," "0 calories," "Total Carbohydrates 0g," "Total Fat 0g" —given generally accepted principles of biochemistry, pharmacology, and physiology, do not and cannot provide "seven hours of sustained energy" or "no crash" as Vital

Pharmaceutical claims. Those claims are also false based on the products' ingredients, in particular, the non existence of calories, sugar, fat and carbohydrates, at least to the extent disclosed on the applicable container labels and/or that are contained in their products.

17. Even if Vital Pharmaceutical were to argue that the Court should ignore every conventional definition of "energy" I discussed in paragraphs 7 through 10 and accept some convenient broader definition of "energized feeling," in my expert opinion, the ingredients (or lack of ingredients) in REDLINE Power Rush! 7-Hour Energy Boost is not adequate to support the product claim of "hours of pure energy," or "sustained energy" set out above.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the facts in this declaration are true and correct, based on my own personal knowledge and on generally accepted science which I believe to be true and correct, and that I executed this declaration on September 8, 2008.

Thomas P. Davis PhD

THOMAS P. DAVIS, Ph.D.

9-8-2008

CERTIFICATE OF SERVICE

I caused the **DECLARATION OF THOMAS P. DAVIS, Ph.D. IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** to be served in the following manner:

Electronic Mail Notice List

Currently no defense counsel appear to be listed to receive e-mail notices for this case.

Mailing List

I served the following by email and Federal Express:

Vital Pharmaceuticals, Inc. Attn: Erica Stump, Esq. 15751 S.W. 41st Street, Suite 300 Davie, Florida 33331	

/s/ Edward J. McIntyre
EDWARD J. MCINTYRE

CURRICULUM VITAE

Thomas P. Davis, Ph.D.
Department of Medical Pharmacology
The University of Arizona
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(520) 626-7643;
(520) 626-4053 (FAX)
E-mail: davistp@u.arizona.edu
Web site: http://www.davislab.med.arizona.edu/

I. EDUCATION

A. INSTITUTIONS, DEGREES & DATES AWARDED:

B.S., Biology, Loyola University of Los Angeles. June 9, 1973.
M.S., Physiology, University of Nevada, Las Vegas. May 18, 1975.
Ph.D., Physiology/Analytical Biochemistry, University of Missouri-Columbia. December 16, 1978.

B. MAJOR FIELDS:

Major emphasis in research is in the areas of central nervous system pharmacodynamics, neuropharmacology, neurochemistry, molecular biology and pathophysiology of the blood-brain barrier endothelium after peripheral inflammation/ hypoxia & reperfusion/stroke/pain/ pathological insult.

NEUROPHARMACOLOGY/NEUROCHEMISTRY/MOLECULAR NEUROENDOCRINOLOGY

Molecular regulation, protein trafficking and functional changes of the blood-brain and blood-cerebral spinal fluid barriers after stroke, hypoxia, or inflammatory pain.
The effects of peripheral and neuropathic pain on the molecular and functional transporter characteristics of the blood-brain barrier and tight junction protein cytoarchitecture.

BIODISTRIBUTION/ PHARMACOKINETICS/ PHARMACODYNAMICS

Biochemical, molecular and physiological characterization of the blood-brain and blood-CSF barrier and the effect of barriers on drug delivery to the CNS.
Pharmacokinetics of central drug disposition including opiates.
Bioavailability/ PKA of neuropharmaceuticals and neutraceuticals .

PRESENT TEACHING RESPONSIBILITY

Medical Pharmacology for Graduate Students- PHCL 501A (Course Director)
Undergraduate Senior Research Practicum - MCB 494. Biochemistry 499.
Undergraduate Independent Study - Chem 399, MCB 399, NRSI 399.
Cardiovascular, Pulmonary and Renal (CPR) Block of Case Based Instruction (CBI) to First Year Medical Students.

II. PROFESSIONAL AND ACADEMIC EMPLOYMENT

1973-1975 Graduate Research Assistant, Dr. David Bruce Dill's Laboratory of Applied Physiology, Desert Biology Research Institute, Boulder City, NV.

1975-1978	Graduate Research Assistant, Dr. Charles W. Gehrke's Experiment Station Chemical Laboratory, Department of Biochemistry, University of Missouri - Columbia.
1978-1980	Analytical/Development Chemist, Therapy Monitoring Venture Group, Abbott Diagnostics Division, Abbott Laboratories, Abbott Park, IL.
1981-1986	Assistant Professor - Pharmacology and Director, Laboratory of Analytical Chemistry and Mass Spectrometry, University of Arizona Health Sciences Center. Founding Director, The Arizona Cancer Center Analytical Core Laboratory. Member, Pharmacology/Toxicology Graduate Program and Arizona Cancer Center.
1986-1992	Senior Research Fellow, NASA Center for Separation Sciences, University of Arizona Biophysics Technology Laboratory, Engineering Experiment Station, College of Engineering.
1986-1991	Associate Professor - Pharmacology and Director, Laboratory of Analytical and Peptide Chemistry, University of Arizona Health Sciences Center. Member, Arizona Cancer Center.
1991-present	Professor - Pharmacology and Program in Neurosciences. Founding Director, Laboratory of Blood Brain Barrier Research, University of Arizona Health Sciences Center. Member, Arizona Cancer Center.
1994-1995	Special Volunteer, NIH. National Cancer Institute, Biomarkers and Prevention Research Branch, Rockville, MD.
1999-2007	Chair, External Advisory Committee. The Aging Brain: Cerebrovascular Mechanisms. Multi-institutional Program. University of Rochester and Socratech Biotechnology Inc., Rochester, New York.
1999-2006	Founding Director, Program in Research Integrity Education, Office of the Vice President for Research and Graduate Studies, University of Arizona.
1999-present	Member, Physiological Sciences Graduate Program and Neuroscience Graduate Program, University of Arizona.
2005-present	Professor, Bio5 Institute, University of Arizona.

III. HONORS & AWARDS

Academic Scholarship awardee to attend Loyola University of Los Angeles (1969-1973).
David Bruce Dill Awardee and Scholar in Environmental Physiology, University of Nevada (1975).
Member, Sigma XI - Honorary Research Society of North America (1977).
International Youth in Achievement Award, University of Missouri (1978).
Member, Gamma Sigma Delta – Honorary Agriculture Society, University of Missouri (1978).
Abbott Diagnostics Division Certificate of Appreciation Award, Abbott Laboratories Inc., (1979).
Member, Who's Who in the West, U.S., World and Frontier's of Science and Technology (1985).
Fellow, American Institute of Chemists (F.A.I.C.).October, 1986.
Member, Phi Beta Kappa Honorary Society (1995).
Member, Neurological Sciences III Study Section, National Institutes of Health, N.I.N.D.S. April 1992 to 1996. Brain Disorders Clinical Neurosciences (BDCN-3) Study Section, July 1996 to 2002.
Fellow, International Neuropeptide Society. July, 1998.
Member, International Organizing Committee, 4th International Conference of Cerebral Vascular Biology, Cambridge University, Cambridge UK, April 7-12, 2001.
University of Arizona Award from Chair of General Faculty and Faculty Senate, University of Arizona, "Extraordinary and Expert Service to the General Faculty of the University," March 5, 2001.
Member, International Organizing Committee, 5th International Conference of Cerebral Vascular Biology, Texas Tech University, Amarillo, TX. June 15-19, 2003.
Volunteer of the Year Award, Salpointe Catholic High School, Tucson, AZ. 2002-2003.
Member, Loyola-Marymount University, College of Science and Technology, "Alumni Wall of Fame," awarded October 18, 2003.
Member, American Heart Association Brain 2 Study Section. January, 2004.
Medallion of Appreciation, Salpointe Catholic High School Administartion and Faculty. Awarded September 10, 2006.
Elected Chair, Gordon Research Conference, "Barriers of the CNS". June 17-22, 2008.

IV. TEACHING

A. COURSES TAUGHT:

1. PHARMACOLOGY 501/801; The Pharmacological Basis of Therapeutics
   Enrollment: 100-120 Medical and Graduate Students; Spring, 1985 (Didactic lectures)
   - General Principles
   - Alcohol
   - Vitamins
   - Gout
   - Drugs of Abuse

   Spring, 1987 to 2006 (Patient Oriented Problem Solving, and Small Group Teaching)
   10 x 3 hour blocks per year.
   - Pharmacokinetics Applied to Asthma
   - Cancer Drugs
   - Treatment of essential hypertension
   - Toxicology
   - Treatment of congestive heart failure
   - Complications of analgesic therapy
   - Treatment of Myocardial Infarction
   - Antithrombotic Therapy
   - Narcotics/Analgesics

   Spring, 1992 to present (Didactic lectures)
   - Narcotics/Analgesics
   - Drugs of Abuse
2. PHARMACOLOGY 653; Neuropharmacology
   Enrollment: 20-25; Fall, 1985 to 1996.
   - Synthesis and Processing of Neuropeptides
   - Analytical Techniques in Neuropharmacology
   - Laboratory: HPLC Analysis of Peptide Metabolites
3. PHARMACOLOGY 550; Drug Metabolism and Disposition
   Enrollment: 30; Fall, 1985; 1986
   - Separation and Analysis of Drug Metabolites
   - Structural Assignments by Mass Spectrometry
4. PHYSIOLOGY 501/801; Medical Physiology
   Enrollment: 100-120; Spring, 1985; 1986; 1987; 1989; 1990; 1991; 1992; 1993; 1994 to 2001.
   - Temperature Regulation in Man
   - Adaptation to Heat
   - Problem Based Learning (16 hour blocks).
5. PHARMACOLOGY 551; Molecular Biology of Pharmacological Agents
   Enrollment: 20; Fall 1989; 1991; 1992; 1993; 1994; 1995; 1996.
   - Regulation of Neuropeptide Gene Expression
6. PHYSIOLOGY/MEDICINE 495 A/B; Principles of Neuroscience
   Enrollment: 15-20; Spring/Fall, 1988
   - Centrally Active Drugs
   - Drugs of Abuse
7. MOLECULAR AND CELLULAR BIOLOGY 494; Independent Study for Undergraduates
   Enrollment: 2-3 per semester. 3 credit hours per student per semester.
   Spring/Fall, 1985; 1986; 1987; 1990; 1991; 1992; 1993; 1994; 1995; 1996; 1997.
   - Effect of Opioid Peptides on Mu, Kappa and Delta Receptors.
   - Methods to Control Microflora in Juice Concentrates.
   - Solid Phase Synthesis of Neuropeptides.
   - Effect of Cell Passage Number and Mycoplasma on Cytogenetics of SCLC Cell Lines.

Characterization of Proteolytic Enzyme Metabolism Using Computer Modeling Techniques.
Use of MTT Assay to Predict Neuropeptide Effects in SCLC Cell Growth.
Development of a Specific and Sensitive Assay for Aminopeptidase M and Leucine. Aminopeptidase: Application to SCLC Inhibition Studies.
Effect of Peptide Structure on *In Vitro* Enzymatic Metabolism.
Effect of Peptide Structure on Binding to Human Plasma.
Effect of Peptide Structure on Permeability through the Blood-Brain Barrier.
Demonstration of Prohormone Convertase mRNA in Small Cell Lung Cancers.

8. MOLECULAR AND CELLULAR BIOLOGY 266; Principles of Neural and General Pharmacology
Enrollment: 60; Summer 1991
9. CLINICAL ROUNDS, Department of Neurology
Enrollment: 5-20; Spring 1992; 1993
Graduate Level Lectures to Neurology Residents Concerning Polypeptide Hormones.
10. PHARMACOLOGY 696 A, Introduction to PHCL and TOX Research
Enrollment: 2-6 per semester for 3 credit hours per semester; Fall 1992 to present
Graduate Level Course Offered to Graduate Students. *Director of Course.*
11. PHYSIOLOGY 485, Undergraduate Physiology Course in Cardiovascular Physiology
Enrollment: 50 per year for 4 credit hours per semester; Spring 1999 to 2005.
12. PHYSIOLOGY 549, Survival Skills and Ethics. Graduate Course offered each Spring.
Enrollment: 50 per year for 3 credit hours per semester; Spring 2000 to 2005.
13. PHYSIOLOGY 700, Research Methodology and Physiological Sciences. Graduate Course offered each semester. Enrollment: 2 per year for 3 credit hours per semester; Spring 2000 to present.
14. PUBLIC HEALTH 696, Research Methodology and Design. Graduate course offered each semester. Enrollment: 10; Fall 2001 to 2006.
15. PHARMACOLOGY and NEUROSCIENCE 595B, Strategic Scientific Writing and Ethics.
Enrollment: 40; Fall 2003 to present.
16. PHARMACOLOGY 501A, Medical Pharmacology for Graduate Students. 3 credit course offered each Spring Semester. *Director of Course.* Enrollment 14. Spring 2008 to present.
17. CASE BASED INSTRUCTION (CBI), Cardio/Pulmonary/Renal (CPR). Medical Student Instruction offered every Spring to 15 First Year Medical Students.Spring 2007-present.

(Revised:July 11, 2008)